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AMERICAN BAR ASSOCIATION

STANDING COMMITTEE ON LAW AND NATIONAL SECURITY

INTELLIGENCE REPORT

Vol. 3, No. 2 | Morris I. Leibman, Chairman | February 1981

Congressional Actions Affecting Intelligence

Congress spent most of the month of January involved in administrative procedures, including confirmation hearings and reorganization of committees. Vice Admiral Bobby Ray Inman, formerly NSA Director, was confirmed by the Senate Intelligence Committee on February 3 as CIA Deputy Director. The Senate Intelligence Committee membership was reported in the January newsletter; however, to date, the House Intelligence Committee has not announced its new members.

On January 5, Edward P. Boland (D-Mass.), Chairman of House Intelligence Committee, addressed the "Intelligence Priorities for the 97th Congress" in the House of Representatives. He reintroduced the intelligence identities' protection bill, H.R.5615, in the form in which it was reported out by both the Intelligence and Judiciary Committees. He also announced his intentions to focus on amending the Freedom of Information Act, plugging leaks, reviewing charter legislation, and "legitimizing the intelligence process." Other bills introduced include: H.R.4 (Boland, Mazzoli, and Robinson), H.R. 133 (Bennett), H.R.387 (Neal) and H.R. 1659 (Rudd), all to prohibit the unauthorized disclosure of information identifying certain U.S. intelligence officers, agents, informants, and sources. On January 22, H.R.1218 (Wilson) was introduced to protect the confidentiality of the identities of certain employees of the CIA and was referred to the Intelligence Committee. S.391, the Intelligence Identities Protection Act of 1981, was reintroduced by Senator Chafee on February 3.

The Senate recessed from February 9 to February 13 and the House from February 12 to February 16.

Standing Committee News

John O. Marsh, Jr., Standing Committee member, was appointed by President Reagan and confirmed by the Senate as Secretary of the Army. He was sworn in at a formal ceremony at the Pentagon on February 9.

The meeting of the Standing Committee, planned for January 30-February 1 in Florida, had to be cancelled due to a slight setback in Morris Leibman's recuperation. Mr. Leibman was rehospitalized for two weeks, but again seems to be making a remarkable recovery. He will remain in Florida for the winter months.

The proceedings of the Conference on Intelligence Legislation sponsored by the University of Chicago and the Standing Committee have been published and copies are available at the ABA Headquarters in Chicago. The Director of Radio Programs at the University of Chicago has released edited tapes of the Conference to 70 radio stations throughout the country for broadcast during February. The University can provide additional information to anyone interested in the specific date of a local broadcast.

Max M. Kampelman, Standing Committee member, continues to Co-Chair the U.S. Delegation to the Madrid meetings on the Helsinki Accords. His remarks to the Plenary Session on January 27 are excerpted in this newsletter.

Opening Statement of William J. Casey Before the Senate Select Committee on Intelligence, January 13, 1981

Mr. Chairman, I am William J. Casey. I have been nominated by the President-elect to serve as Director of Central Intelligence. It is an honor for me to be here today to meet with you and the other members of the Committee for the purpose of discussing my qualifications for this post. I believe it to be vital that this nation have a strong and effective intelligence organization with a wide range of capabilities and the flexibility to adapt and focus them on whatever exterior threats or problems confront the President, the National Security Council, the Congress, and the Executive Branch. It may be helpful to outline the experiences which have formed my views on intelligence.

In World War II, as a naval officer, I had intelligence assignments first in Washington as an aide to William J.

INSIDE

Kampelman in Madrid ..... **p. 4**
Casey Confirmation Hearing ..... **p. 4**
Federal Employee Security Program ..... **p. 5**

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Donovan, then the director of the Office of Strategic Services, and subsequently in London as an aide to Colonel David K.E. Bruce, the commanding officer of the Office of Strategic Services in the European Theatre of War commanded by General Eisenhower. Our activities there consisted primarily of working with British and French intelligence and supporting French resistance forces to develop support for the allied armies which invaded and liberated France. When it became clear in the Fall of 1944 that there would be hard fighting in Germany, I became engaged in shifting what had been a French-oriented organization, to one that could function effectively in Germany. When we were surprised by the Hitler counteroffensive in what became known as the Battle of the Bulge, I was appointed Chief of Secret Intelligence for OSS in the European Theatre. In this capacity, I was charged with sending observers to rail and other transportation centers in Germany to report on the movement of German forces, targets suitable for air attack, and similar military information.

For a few years immediately after World War II, I worked with General Donovan, General Quinn, who is here today, and with colleagues in wartime intelligence in urging that our nation needed a permanent central intelligence and in studying how such an organization should be organized and function. Since that time, I have spent my working life as a practicing lawyer and as an author, editor and entrepreneur, all of these activities involving somewhat the same kind of gathering, evaluation and interpretation of information which good intelligence work requires. I maintained an interest in foreign policy and national defense. As a founding director of the National Strategy Information Center, I supported the establishment of chairs and professorships in national security on 200 campuses throughout the United States.

During 1969, President Nixon appointed me to the General Committee on Arms Control, on which I served during the preparation and negotiations for SALT I. This experience impressed upon me the vital significance of good intelligence in establishing adequate defense, in negotiating arms control arrangements and in verifying that those arrangements are being observed. I was also a consumer of intelligence as Under Secretary of State in 1973 and 1974. As a member of the Commission of the Organization of the Government for the Conduct of Foreign Policy, known as the Murphy Commission after its chairman Robert Murphy, I took a special interest in the organization of the intelligence community, in improving the relevance and quality of analysis and developing a more effective relationship between producers and consumers of intelligence.

In 1976, President Ford appointed me a member of the President's Foreign Intelligence Advisory Board. There my special interests were economic intelligence and the experiment in the competitive analysis of Soviet strategic intentions, the potential capabilities of Soviet air defense and the accuracy of Soviet missiles.

There is no need for me to describe to this Committee the varied and complex challenges that confront our nation, the complexity of the political, military and economic forces with which we must deal or the importance of good intelligence to the formulation and execution of effective policies. If I am confirmed for the position for which I have been nominated, it will be my purpose to provide for our policymakers, in the Congress as well as the Executive Branch, timely and accurate information, analysis and estimates on which they can rely, in establishing the defense strength that we need, in seeking arms control, in developing and maintaining satisfactory relations with other nations, and in competing in an increasingly interdependent global economy. Our foreign policies and defense strategies can never be better for long than our intelligence capabilities. In an era of increasing military vulnerability, effective intelligence is of far greater importance than it may have been some years ago when we had clear military superiority. Anticipating potential problems, understanding the reasons behind events and foreseeing all the potential opportunities—both diplomatic and military—will be critical to successful international relations over the next decade. We are in a period where investments in intelligence capabilities will yield major returns.

Generally, there is poor public perception and understanding of the value of the American intelligence community to the security of the free world. The CIA, in particular, suffers institutional self-doubt. Many of its most competent officers have retired or are about to retire. The morale of much of the agency is low. Too often the agency has been publicly discussed as an institution which must be tightly restrained, stringently monitored or totally reorganized. Little has been done in recent years to stress publicly the critical role which the intelligence community must play in the formulation and execution of our nation's foreign policies and defense strategies. Too many have worked to reduce the feeling of self-worth of intelligence officers. Too few have worked to motivate the best minds in this country to see the intelligence profession as one which is desperately needed for our national security.

While members of the community realize that they cannot receive public recognition for particular tasks well done, they rightfully expect the support of the government which they serve. All too often their "failures" are widely publicized, but their "successes" by their very nature are generally hidden.

We need to make it clear that, while we work to improve it, the intelligence community has our full trust and confidence, that the intelligence profession is one of the most honorable professions to which Americans can aspire, and that we have an appreciation for the dedication a professionalism of its members. We should call on young Americans to serve their country in the field of intelligence. We should ask American scholars to serve their country by sharing their scholarship and insights with those in the community who are responsible for

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preparing the intelligence analyses used to develop foreign policy and defense strategy.

In the months ahead, this nation will continue to confront major international crises. This is not the time for another bureaucratic shake-up of the CIA. Instead, it is a time to make American intelligence work better and become more effective and more competent and make the members of its establishment respected and honored.

In almost every instance in recent years, so-called "intelligence failures" have been the result of shortcomings in intelligence analysis. The necessary relevant information was generally available, but sometimes either good analyses or sound conclusions did not follow. To be truly beneficial to consumers, data collected must be subjected to critical and insightful analysis conducted by trained, competent professionals who have a rich background in the subjects involved. The issues which we have to deal with require the best analytical capabilities applied to unclassified as well as classified sources.

The attractiveness of intelligence analysis as a profession, part-time as well as full-time, should be increased. We must tap the insights of the nation's scholars in the effort to upgrade the quality of intelligence analysis. We must search for new and better ways to get continuing input from the outside world in order to gather information available inside and outside the government and get the best analyses of the full range of views and data available. A revival of the President's Foreign Intelligence Advisory Board can contribute substantially to this, and there are many other possibilities. When I was Chairman of the Securities and Exchange Commission, I created a large number of task forces made up of members of the SEC staff and people experienced in various phases of the investment industry. Assigned to report on regulatory needs for new forms of investment and trading, on minimizing paperwork and regulatory burdens, making investment analyses more widely available, and similar subjects, we observed insight and perspective which was just not available in Washington.

It is not enough to have good information and accurate assessments. The findings and views of the intelligence community must be forcefully and objectively presented to the President and the National Security Council. I assure you that I will present these views without subjective bias and in a manner which reflects strongly held differences within the intelligence community. It will be my purpose to develop estimates which reflect a range of likely developments for which policymakers must prepare in a manner which emphasizes hard reality undistorted by preconceptions or wishful thinking. As we look back at the recent past, we need to remember how early intelligence reports on Soviet missiles in Cuba in 1962, on Soviet divisions preparing to enter Czechoslovakia in 1968, on Arab preparations to attack Israel in 1973, were obscured by judgments that it would not be sensible for these weapons and divisions to have other than defensive or training purposes. Alternative possibilities and their implications must be fully set forth in our assessments so that they can be reflected in our preparation and in our policies.

To carry out it's assignment, the intelligence community needs both public support and the full participation and cooperation of the Congress. I am pleased that after a period of turmoil the Executive and Legislative Branches have now institutionalized their arrangements in the Intelligence Authorization Act of 1981. I pledge care and diligence in protecting the legal rights of American citizens. I pledge also to work closely with Congress on this as well as in monitoring and improving the performance of the intelligence community. Particularly through the Intelligence Committee's study of U.S. intelligence products, procedures and budgets, Congress will provide a valued independent source of review to ensure we are achieving all that is humanly possible and the Congress will be in a position to provide any necessary legislation.

I will cooperate fully in facilitating the oversight through which Congress can ensure that the intelligence community operates within the limits of the law. This will provide the American people with additional assurance that U.S. intelligence will fully respect their civil liberties, and further strengthen public confidence in our intelligence community.

We have a common purpose in having a comprehensive intelligence system of unqualified preeminence, operating efficiently and within the requirements of our laws.

I expect to conclude that there are some steps which should be taken to improve our intelligence performance. If confirmed, I will promptly, in consultation with the leaders of the intelligence community and the Congress, review without preconception the system as it now exists and how it is working.

Many Senators and Congressmen have put forward a number of suggestions to protect the identities of U.S. intelligence officers and provide relief from some aspects of the Freedom of Information Act. I, too, share the concerns that led to these actions, and I hope that Congress will complete the important work initiated in the last session.

I will examine how we are utilizing the resources we have to produce intelligence. Are we attracting enough of the best people, and providing them with the best possible training? And, are we providing adequate incentives so that we can keep the most competent of those we have now? I know you and your counterpart committee in the House, and academic experts outside of the Congress, have been studying these matters. I would plan to review my findings with you as soon as possible to determine how we can build on our strengths and reduce areas of weakness.

I welcome any questions you may have.

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Remarks by Max M. Kampelman Co-Chairman, U.S. Delegation to the Plenary Session—CSCE Madrid, January 27, 1981

One week ago today Ronald Reagan was inaugurated as the fortieth President of the United States. I speak at this first plenary session of our renewed meetings here in Madrid to assert once again that the position of the Government of the United States, expressed at these meetings during our preparatory sessions and during the first phase of our main meeting, remains a constant one ....

When our main meetings began on November 11, my country was in transition. We were under the leadership of a President who was in office; and we were about to welcome a President-elect who was preparing to assume office. I stated then that our Government was deeply concerned over the fact that the provisions of the Helsinki Final Act were being blatantly violated and that those violations cast a shadow over our meetings. The American people, along with peoples elsewhere, had come to question the validity of seeking new commitments from a state which had not lived up to commitments it had previously made....

I made those statements then and I reassert them now, Mr. Chairman, with my Government under the direction of a new President. The Government of the United States and the American people continue to deplore these violations of the Helsinki Final Act. They are barriers to international harmony and peace.

The review of implementation phase of this meeting ended on December 19. It was therefore our hope, Mr. Chairman, that it would not be necessary at this reconvened meeting to refer to specific terms to violations and challenges to the integrity of the Helsinki Final Act. The violations, however, continue and intensify, and we have no choice but to respond in this forum....

Practical steps taken to improve human dignity and freedom and to confirm the integrity of sovereign states would produce a significant improvement in the international atmosphere and would lead the American people to respond positively.

Reference was made here this morning to "detente." The word appears in the Final Act. If the word has any significance, we must realize that it does not today exist as an accurate description of East-West relations. It remains, however, an objective to be sought, yet to be achieved.

Mr. Chairman, our agenda calls for us to proceed, beginning today and for the next six weeks, to discuss and negotiate new proposals and hopefully to fashion a significant concluding document arising out of those new proposals. Our delegation will pursue that task diligently and responsibly. We all realize, however, that words alone will not accomplish our purpose if they are not accompanied by proper constructive action by all signatories of the Final Act. Positive action is called for if we are to rebuild the confidence necessary for agreement....

Casey Confirmation Hearing

On January 13, 1981, William J. Casey appeared before the Senate Select Committee on Intelligence as President Reagan's nominee for Director of Central Intelligence. Casey had been Chief of Secret Intelligence for OSS in the European Theatre, a founding director of the National Strategy Information Center, a member of Nixon's General Committee on Arms Control, a member of the Commission of the Organization of the Government for the Conduct of Foreign Policy (Murphy Commission), and a member of the President's Foreign Intelligence Advisory Board. As a consumer of intelligence, he served as Under Secretary of State during 1973 and 1974. He was a featured speaker at the Standing Committee's Law, Intelligence and National Security Workshop in Washington in December 1979.

In his opening statement to the Senate Committee, Mr. Casey emphasized the need for an improved intelligence capability that has the full trust and confidence of the President and the nation. (See this *Intelligence Report*) He stated, "This is not the time for another bureaucratic shake-up of the CIA. Instead, it is a time to make American intelligence work better and become more effective and more competent and make the members of its establishment respected and honored." He urged that the quality of intelligence analysis be upgraded from both within and outside the intelligence community. "It is not good enough to have good information and accurate assessments. The findings and views of the intelligence community must be forcefully and objectively presented to the President and the National Security Council."

Casey pledged his cooperation with Congress through the provisions of the Intelligence Authorization Act of 1981 that requires the DCI and other heads of intelligence agencies to keep the intelligence committees fully and currently informed and to respond to their requests for required information. He ended his formal statement by addressing those legislative issues he feels require immediate attention, namely the protection of agents' identities and relief from certain aspects of the Freedom of Information Act.

Senate Goldwater (R-Ariz.), Chairman of the Committee, welcomed Mr. Casey with the declaration that, "One of the most pressing issues facing the intelligence community is the need for strong, stable and experienced leadership." His remarks centered on the need "... to re-establish a robustness in the intelligence system... to expand and improve the analytic capabilities within the intelligence community...." and to strengthen human source collection activities in key areas around the world. He too appealed for speedy congressional action on the FOIA and the public identification of CIA operators.

Casey said he could not now conceive of any circumstances under which he would not comply with the oversight responsibilities of the Committee in reply to Senator Moynihan (D-N.Y.). Senator Wallop (R-Wyo.) addressed the problem of public recognition of the need for intelligence, and took note of Casey's participation in

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the ABA Standing Committee's "Law, Intelligence and National Security Workshop" held in Washington, D.C., December, 1979 as an example of an avenue through which the role of intelligence could be better defined for the public. He said such a forum could improve public perception of the intelligence community. Questioned by Walter Huddleston (D-Ky.) about "covert actions" and secret operations, Casey affirmed the views of the Murphy Commission "generally." The Commission had concluded that prohibition of covert action would put the nation and its allies at a dangerous disadvantage, but that it should only be utilized in such areas where it is clearly essential to vital U.S. interests. Casey, when pressed by Senator Biden (D-Del.), explained, "There is a point at which rigid accountability, detailed accountability can impair performance." In conclusion, Casey was urged by several members of the Committee to select NSA Director Inman as his deputy.

The Federal Employee Security Program

by David Martin

Since the Civil Service Act of 1883, there have existed a whole series of legislative enactments which in effect stipulate loyalty and fidelity as conditions of federal employment. This legislation has in part been paralleled, in part reinforced by a series of Executive Orders issued by President Truman, President Eisenhower, and President Nixon.

Executive Order No. 10450, which was promulgated by President Eisenhower in April 1953, opens with the clause:

> Whereas the interests of the national security require that all persons privileged to be employed in the departments and agencies of the Government, shall be reliable, trustworthy, of good conduct and character, and of complete and unswerving loyalty to the United States.

Surely no reasonable person could find fault with this stipulation. Indeed, there have been repeated decisions of the Supreme Court upholding the constitutionality of measures designed to "safeguard the public service from disloyalty." (*Cramp v Board of Public Instruction*, 368 US 278, 288, 1961.)

Most informed Americans take it for granted that their government today is served by procedures designed, to use Justice Frankfurter's words, to "assure themselves of fidelity to the very presuppositions of our scheme of government on the part of those who seek to serve it." (*United Public Workers v Mitchell*, 330 US 75, 102-103.) But the fact is that over the past decade or more there has been a progressive retreat from the entire concept of personnel security in government, to the point where this program for all practical purposes has ceased to exist, in all major government departments, with the notable exceptions of the Department of Defense and the intelligence community and key sectors of the law-enforcement community. Even in the case of DOD and the intelligence agencies, however, the employee security program has undergone serious attrition in various ways. Civilian employees in the Pentagon, for example, are processed according to the meaningless criteria of the old Civil Service Commission, which were inherited intact by the Office of Personnel Management.

As matters stand at this moment, applicants processed for government agencies by the Office of Personnel Management cannot be denied federal employment on the basis of what is called "mere membership" in subversive organizations of the far left or the far right, including the Communist Party, the Trotskyist Party, the KKK, the American Nazi Party, the PLO and the Puerto Rican Socialist Party. For employment to be denied, there must be a criminal record—the applicant must have been indicted or convicted. In line with this, applicants for employment, even in sensitive positions, cannot be asked about membership in organizations committed to the violent overthrow of the United States government or to the use of force for political purposes. Nor, in the absence of an indictment or conviction, can information about such membership coming from a third party source be entered into the record of the investigation.

> Members of an organization are reported to have set fire to the campus ROTC building. If the subject of investigation is reported to be a member of this group, our inquiry would be limited to his/her activities, if any, in connection with the act of arson.

The final contributing factor to the dissolution of the Federal Employee Security Program is the fact that investigators, analysts and administrators concerned with personnel security have been compelled for some years now to operate without accepted criteria and guidelines.

The series of circumstances and decisions that brought the Federal Employee Security Program to its present lamentable state cannot be attributed to any single agency or any single Administration. It is the product of a complex set of developments, involving both Democrats and Republican Administrations, decisions of the Supreme Court, the Privacy Act and the Freedom of Information Act, and arbitrary rulings by the Counsel for the Civil Service Commission and its successor, the Office of Personnel Management, putting the most restrictive interpretations on Supreme Court decisions and other court decisions and on the requirements of the privacy legislation.

During the 50's and 60's there were several rulings and in-house directives which had the effect of weakening certain aspects of the Federal Employee Security Program. But the basic structure remained intact. Over the past five years, however, there has been a rapid succession of concessions and retreats that has for all practical purposes resulted in the total demolition of the program.

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In October 1976, the Civil Service Commission eliminated loyalty questions from application forms for employment in the Federal Civil Service. The reason given was that "recent court decisions have prohibited routine inquiry into an individual's membership in certain organizations." This directive, however, had a caveat which permitted the asking of such questions where sensitive positions were involved. In a follow-up directive issued one year later, in October 1977, this caveat was cancelled in the case of sensitive positions because "the commissioners accepted the legal opinion of the Commission's General Counsel that Question 21 has a chilling effect on First Amendment rights and Question 22 is unconstitutionally vague."

The question must be raised whether all the retreats ordered by the Civil Service Commission were really made mandatory by Supreme Court decisions and by the Privacy Act. For example, the November 12, 1973 memorandum which led to the elimination of questions dealing with organizational affiliations said that "recent decisions of the Supreme Court make it clear that mere membership in an organization that espouses the unlawful overthrow of the government may not be inquired into, and that the only fact of relevance is membership with knowledge of the unlawful purpose of the organization and with specific intent to carry out that purpose." But at the point where the Commission moved to eliminate all questions relating to membership in the Communist Party or the KKK or other subversive organizations and issued rulings that even third parties could not be asked such questions about applicants for employment and that such information could not be incorporated in the investigative record if offered on a voluntary basis, the Commission was imposing an interpretation that went far beyond the requirements of the Supreme Court decisions. Before a determination can be made that an applicant for employment has been a knowing member of the communist conspiracy, sharing a specific intent to carry out its purposes, it is clear that the fact of membership must first be established. The present rule governing applications for federal employment makes it impossible to arrive at such a preliminary determination.

These self-inflicted injuries to the Federal Employee Security Program have been compounded by the progressive chill on the exchange of data between state and local agencies and the federal government. Commenting on this point, a GAO report dated Demember 16, 1977 said:

> Due to legal constraints and nonresponses to inquiries, CSC cannot check some local enforcement records, even though the check is required by Executive Order 10450. By September 1976, the Chicago area (of CSC) had stopped sending (requests for information) to law enforcement agencies in New York, California, Minnesota, New Mexico, Massachusetts, and Illinois, and 86 cities in other States, because the agencies refused to release criminal information to CSC. Some of the larger cities are Detroit, Indianapolis, and Washington, D.C. Thus, an investigation cannot surface criminal information on individuals who reside in these areas, unless the information is also on file with the FBI.

The FBI still remains the principal organization to which all federal agencies—including the Defense Department and our intelligence agencies—turn for background information when they are conducting National Agency Checks of applicants. The trouble is that as matters stand today the FBI has virtually no data base on which to draw because it has withdrawn from internal security activities to the point where it is no longer reading and clipping extremist publications.

What Can Be Done

So much damage has been done that, even with the most energetic effort, it is going to be a long and difficult task to recreate a viable Federal Employee Security Program.

The first requirement is a new Executive Order to replace EO 10450, which, while theoretically retaining the force of law, has for all practical purposes been ignored in recent years. There are certain respects in which EO 10450 can be improved and this by itself would be justification enough for writing a new Executive Order amending or substituting for 10450. Beyond this, such a new Executive Order, as a declaration of Presidential intention, could at one stroke relieve the paralysis which today afflicts those involved in the implementation of the Federal Employee Security Program.

Among other things, the FBI should be specifically instructed, in connection with the requirements of the Federal Employee Security Program, to resume the active monitoring of extremist organizations of the far right and the far left—those which are committed to the revolutionary overthrow of the government and/or are controlled or substantially influenced by hostile foreign governments; those which are committed to the use of violence to deny our citizens their constitutional rights; and those organizations which, at any given period, according to the best judgment of the FBI and the Justice Department, pose a serious danger to domestic tranquility. With such information at its disposal, the FBI will be able to provide meaningful replies in response to National Agency Checks and will be in a position to provide the Attorney General with the organized data he must have in order to prepare guidelines for federal agencies.

It may be argued that the institution of such a program will open the way to a repetition of some of the highly publicized abuses of the past. The author of this article happens to believe that, compared to the services rendered to the nation, the abuses, although they admittedly existed, were very minor. Be that as it may, the degree of Congressional oversight that now exists virtually guarantees that there will be no repetition of abuses.

The choice is simple. We must either abandon all pretense at maintaining a Federal Employee Security Program—or we must, by Presidential directive, give the FBI the responsibility and the authority for gathering and maintaining the basic data essential to the implementation of such a program.

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